



APPENDIX

LEGISLATIVE RECORD

BEING COPIES SERIATIM OF EIGHT BILLS AND ONE ACT IN
CONGRESS

(56 STAT. 1122)

Modifications from one bill to another indicate the intent and barter of the petitioner and the law-making branches of the Government, the Congress and the Executive, apropos the ruling of the Court of Claims that there was no intention to include in the Special Act the item for the work of excavating material which caved in over the tunnel arch.

1st Bill, 1/20/38.

This bill purported to base liability on the contract of December 3, 1924, as if the court had granted the fourth motion for a new trial, i.e., for all items originally claimed.

75TH CONGRESS,
3d Session

IN THE HOUSE OF REPRESENTATIVES

January 20, 1938

Mr. Palmisano (by request) introduced the following bill; which was referred to the Committee on Claims and ordered to be printed

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.
That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon, notwithstanding the lapse of time or any provision of law or rule of the court to the contrary, the claim of Allen Pope, District of Columbia, for damages arising from a contract dated December 3, 1924, between the United States and the

said Allen Pope for the construction of a tunnel in the District of Columbia. The Court of Claims shall hear, determine, and render judgment upon such claim in the same manner as if the court had granted the fourth motion of the said Allen Pope for a new trial (following the decision of the court on March 7, 1932, of the case of Allen Pope against The United States), such motion being overruled by the court on December 6, 1937, on the basis of lack of jurisdiction. Such suit shall be brought within one year from the date of enactment of this Act. Review of such judgment may be had, by either party, in the same manner as is provided by law in other causes in such court.

Sec. 2. There is authorized to be appropriated such sum as may be necessary to pay the amount of any judgment rendered pursuant to this Act.

2nd Bill, 2/7/38.

This bill is identical with the foregoing except, having been introduced in the Senate, the heading is:

75TH CONGRESS, S. 3406.
3d Session

IN THE SENATE OF THE UNITED STATES
January 5 (calendar day, February 7), 1938

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

3rd Bill, 1/17/39.

This bill, except for the heading, is identical with the foregoing, the bill having been reintroduced in the new Congress. The heading is:

76TH CONGRESS, S. 744.
1st Session

IN THE SENATE OF THE UNITED STATES
January 17, 1939

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

4th Bill, 7/27/39.

This bill discards the contract as cause of action and purports to create new liability but only for three items of claim.

No item for excavation of materials caved in from over the tunnel arch is included in this bill.

The bill is:

76TH CONGRESS, S. 2906.
1st Session

IN THE SENATE OF THE UNITED STATES

July 27 (legislative day, July 25), 1939

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, any provisions of the contract, purported release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope against the United States, arising out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment upon his claims for (1) the amount of dry packing and grouting supplied and used by the said Pope in the construction of said tunnel, for which dry packing and grouting the said Pope has not been paid; and (2) the damages and extra costs incurred by the said Pope in complying with certain orders of the contracting officer, which orders were in excess of any authority con-

ferred by the contract and which so changed the plans for the work as to lower the upper "B" or "pay" line 3 inches, and also required the omission of timber lagging from the side walls.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit, together with any additional evidence which may be taken therein, any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, Numbered K-366, in the Court of Claims.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

5th Bill, 4/10/40.

Observe in this bill the following:

- (1) It provides for payments at the "contract rates."
- (2) It adds provision "for the work of excavating materials which caved in over the tunnel arch."
- (3) It further provides for use of the "liquid method" of measurement of spaces.
- (4) In the title it adds the letter "s" to the word "claim" thus making it plural and reading "claims of Allen Pope".

The bill reads:

76TH CONGRESS,
3d Session

S. 3751.

IN THE SENATE OF THE UNITED STATES

April 10 (Legislative Day, April 8), 1940

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope against the United States

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
That jurisdiction be, and is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope against the United States, arising out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

6th Bill, 8/6/40.

This bill added the clause in section 1, "as described and in the manner set out in section 2 hereof." Otherwise it is the same as the foregoing. As here drafted the bill is the same as that ultimately enacted.

76th Congress

3d Session

S. 4243

IN THE SENATE OF THE UNITED STATES

August 6 (Legislative Day, August 5), 1940

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

A Bill

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Poe, his heirs or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

7th Bill, 1/23/41.

This bill was the same as the foregoing except that having been introduced in a new Congress, the number and caption were changed accordingly. The heading is:

77th Congress

1st Session

S. 531

IN THE SENATE OF THE UNITED STATES

January 23, 1941

Mr. Walsh introduced the following bill; which was read twice and referred to the Committee on Claims

8th Bill, 3/25/41.

This was companion bill in the House with the foregoing Senate bill and is identical with the two preceding bills. The heading is:

77th Congress

1st Session

H. R. 4179

IN THE HOUSE OF REPRESENTATIVES

March 25, 1941

Mr. Healey introduced the following bill; which was referred to the Committee on Claims

An Act, 2/5/42.

This Act, which passed the House July 15, 1941, passed the Senate February 13, 1942, and was approved by the President February 27, 1942. It is the same as the three preceding bills above listed. Its full terms were before Congress from August 6, 1940 to February 13, 1942. The Act is reproduced in full in several places in the record. The heading is:

77th Congress

2d Session

Calendar No. 1053

H. R. 4179

[Report No. 1019]

IN THE SENATE OF THE UNITED STATES

July 17, 1941

Read twice and referred to the Committee on Claims

February 5 (Legislative Day, February 2), 1942

Reported by Mr. Hughes, without amendment

An Act

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

The afore-mentioned Report No. 1019 of the Senate Committee on Claims is set out below in toto. Portions thereof, relating expressly to the item of excavating materials which caved in from above the tunnel arch, here to be noted are:

(1) Under the caption, "Statement of Facts", post 25, 1st par., 2nd sentence, observe the phrase, "namely certain excavation * * *".

(2) Under the caption, "Present Bill is only remedy", post 27, 1st par., 2nd sentence, note the clause, "and because it did not allow him *other items of work* which he performed but *for which he was not paid*, * * *" (italics added). This refers to Section VI thereafter (post 38) the title of which is "VI. Other Items of Work for Which Claimant Has Not Been Paid." See note (6) below.

(3) Under the caption, "Report of Attorney General follows:" post 28, observe the first two sentences in paragraph 2, post 30, especially the second sentence in which the Attorney General paraphrases the language of the Act:

Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to

change orders *and the excavation of caved-in places* and the filling of such caved-in places with dry packing and grout. (italics added).

(4) Under the caption, "III. The Contract Project", post pp. 32-33, observe that this section relates principally to the representations and warranty made in the contract as to the geological formations explored by the Government and planned for by the Government. These representations were the basis of petitioner's prior suit for alleged misrepresentation, 76 C. Cls. 64; 81 C. Cls. 658; 86 C. Cls. 18. They are set out in the Report as background or conditions precedent to the statements to follow in Section IV.

(5) Under the caption, "IV. Conditions in Performance Giving Rise to Claims", post 33, observe that virtually all of this Section IV relates to the fact of roof cave-ins and the ensuing costs.

The roof of the excavation caved in for the full length of the tunnel, 3543 feet. * * *

Obviously, therefore, the items of expense which the contractor did incur had not been anticipated to such an extent by the Government or by the contractor; *these items were the cost of removing all caved-in materials from the tunnel*, * * * (italics added).

(6) Under the caption, "VI. Other Items of Work for Which Claimant Has Not Been Paid", post 38, observe Note (2) hereinabove wherein was indicated that the Committee on Claims referred especially to this Section VI, the opening part of which refers to the excavation of the caved-in materials as follows:

VI. Other Items of Work for Which Claimant Has Not Been Paid

The court further found that the cost of excavating the tunnel was materially increased to the contractor, because he encountered much material that was soft, seamy rock, and running earth, "materials contrary in formation from what he expected to encounter" (Finding XIV, R. 673, Decision, p. 11). *As the result of this*

*condition, he was required to excavate materials which caved in over the tunnel arch, * * * (italics added).*

The full text of Report No. 1019 follows:

CALENDAR No. 1053

77th Congress, 2d Session

Senate Report No. 1019

ALLEN POPE

February 5 (legislative day, February 2), 1942—Ordered
to be printed

MR. HUGHES, from the Committee on Claims, submitted the
following

REPORT

[To accompany H. R. 4179]

The Committee on Claims, to whom was referred the bill (H. R. 4179) to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, having considered the same, report favorably thereon with the recommendation that the bill do pass without amendment.

The facts are fully set forth in House Report No. 865, Seventy-seventh Congress, first session, which is appended hereto and made a part of this report.

[H. Rept. No. 865, 77th Cong., 1st sess.]

The Committee on Claims, to whom was referred the bill (H. R. 4179), to confer jurisdiction upon the Court of

Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

Statement of Facts

The purpose of the bill is to confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon certain claims of Allen Pope, arising out of his construction of a tunnel for the extension of the water-supply system of the District of Columbia. The bill limits the jurisdiction of the court to certain items of work performed by the said Pope in complying with orders of the contracting officer, for which items he has not been paid, but of which the Government has received the use and benefit, namely certain excavation and concrete work and filling in caved-in spaces with dry packing and grout. Payment to the said Pope by the court would be at the rates provided in the contract.

The report of the Attorney General of the United States upon this bill is attached hereto and made a part of this report. Without making any recommendations as to the proposed legislation, the Attorney General stated:

“Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions.”

It should be noted, however, that the Attorney General’s report, in referring to section 2 of the bill and the items or claims to be considered by the court, states that certain of these claims were denied by the Court of Claims “on the ground that the change orders were not in writing as required by the contract.” The Attorney General stated that section 2 “in effect would waive the contract requirements that change orders be in writing.”

It was the contention of the claimant, Allen Pope, before your committee that the Court of Claims had erred in its decision in this regard, because as a matter of fact the change orders of the contracting officer were in writing as required by the contract, and hence the bill does not, as

the Attorney General stated, waive the contract requirements that change orders be in writing. Claimant contended, therefore, that the bill is necessary to enable the court to correct its error and to enable him to recover, only at contract rates, the value of the work performed by him pursuant to duly authorized orders of the contracting officer, all of which work was inspected and accepted by the Government inspectors, but for none of which has he been paid.

Error of the Court

Your committee have fully examined the contentions of the claimant, and the copies of original exhibits filed by him in the Court of Claims. It is the judgment of your committee that claimant is correct in his contentions that the change orders were in writing, that the contract requirements were met and the bill does not waive any contract requirements "that change orders be in writing," as the Attorney General states. Claimant having duly complied with, and having required the contracting officer to comply with, the terms of the contract in this respect, he is entitled to present his claim again to the court in order to enable it to correct its error.

That the change orders were in writing, is clearly established from the contract drawings and other exhibits filed in the court. The original drawings show the tunnel section as it should appear in the course of construction, and such original drawings were supplied claimant upon his commencement of the work. Subsequently, revised contract drawings were submitted to him, showing thereon, in writing, certain revisions, as well as appropriate changes in the sketch of the tunnel section thereon. Finally, such revised contract drawings were transmitted to the claimant by letter from the contracting officer, dated July 23, 1925. These drawings and exhibits are referred to in detail in the "Statement of Allen Pope," attached hereto and made a part hereof.

Manifestly, the court erred in finding that these change orders were not in writing, and the Attorney General likewise erred in making the same statement.

Present Bill is only remedy available to Claimant

Enactment of the pending bill is necessary to afford relief to claimant in this regard. Because of the error of the court, and because it did not allow him other items of work which he performed but for which he was not paid, claimant endeavored, through five motions for new trial, to have his case reopened and readjudicated by the court. The court overruled these motions, and the court's position, as to its lack of jurisdiction to reopen the case was fully stated on December 6, 1937 (when overruling his fourth motion for new trial), as follows:

"We discussed in 81 Court of Claims 658 our inability to grant the new trial asked for, and we are convinced now, as we were then, that the court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court. * * *

"The remedy available to plaintiff, in our view of the present status of the record, resides exclusively in Congress, and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled." [Italics added.]

Pursuant to the suggestions of the court, the claimant has had legislation introduced, in order that he may endeavor to secure relief by having certain of his claims readjudicated by the court. There is no questioning the fact that he was put to additional items of expenses by reason of the change orders of the contracting officer; that the claimant did supply certain dry packing (stones put into place) and grout (liquid cement mortar pumped into the spaces between the dry packing); that this was done under orders and supervision of the contracting officer; and it was accepted by the Government inspectors after inspection thereof.

The reported bill would enable the court to correct its error; reimburse him for the expenses to which he was put as the result of the change orders; determine the amount of dry packing "by the liquid method as described by the court and based on the volume of grout actually used;" and determine the amount of grout supplied as established "by the

court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing."

Conclusion

Reference of this matter again to the court seems only just and equitable in order to obviate a hardship which was imposed upon the contractor. Only in this way can the Congress enable the court to rectify its own mistake and compensate the claimant for materials and labor which he furnished to the Government, which were necessary in the construction of the tunnel, which the contracting officer directed to be supplied, of which the Government has received the benefit and use these many years, and yet for none of which has the claimant been paid. Enactment of H. R. 4179 is therefore recommended by your committee.

Report of the Attorney General follows:

Office of the Attorney General,
Washington, D. C., April 28, 1941.

Hon. DAN R. McGEHEE,
Chairman, Committee on Claims, House of
Representatives, Washington, D. C.

MY DEAR MR. CHAIRMAN:

This acknowledges your letter of April 15, 1941, requesting my views relative to a bill (H. R. 4179) to confer jurisdiction on the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States arising out of a contract made by him with the United States for the construction of a tunnel to carry a part of the water supply for the District of Columbia.

The files of this Department show that on December 3, 1924, Allen Pope entered into a contract with the United States to construct a tunnel to carry a part of the water supply for the District of Columbia. The work was completed on July 14, 1927, approximately 7 months after the date fixed by the contract.

On August 23, 1929, Pope filed suit in the Court of Claims for additional expenses alleged to have been caused by

changes made by Government officers in the specifications; expenses caused by alleged unwarranted interference with the contractor in the performance of the work; and cost of additional material used in excess of that contemplated by the contract. The amount claimed was \$306,825.33. Testimony was taken at great length. The case was submitted to the court on voluminous briefs and oral arguments. The court passed on the merits of the claim and, on March 7, 1932, rendered judgment in favor of the claimant in the sum of \$45,174.46 (*Pope v. United States*, 76 C. Cls. 64).

The court denied recovery on the items of expense resulting from change orders on the ground that such orders were not in writing as required by the contract.

On May 6, 1932, the plaintiff filed a motion for a new trial, which was denied on June 5, 1933. Thereafter, on August 2, 1933, the plaintiff filed a motion for leave to file a second motion for a new trial. This motion was overruled on August 15, 1933. Subsequently, on May 7, 1935, the plaintiff sought leave to file a third motion for a new trial. Such leave was granted. On June 10, 1935, the court overruled the plaintiff's third motion for a new trial, holding that "a motion for a new trial after expiration of the term when the judgment became final may not be allowed unless it appears that the judgment resulted from imposition and fraud upon the Court" (*Pope v. United States*, 81 C. Cls. 658).

On July 15, 1935, the Government paid the plaintiff the sum of \$45,174.46 awarded him by the judgment of the Court of Claims.

Subsequently, however, on September 27, 1937, the plaintiff sought leave to file a fourth motion for a new trial. This leave was granted and, on December 6, 1937, the court overruled the motion for a new trial on the ground that it was filed after the expiration of the term in which the judgment became final.

Thereafter, on March 4, 1938, the plaintiff filed a petition in the Supreme Court for a writ of certiorari to review the judgment of the Court of Claims. This petition was denied on March 28, 1938 (303 U. S. 654).

The bill under consideration proposes to confer jurisdiction on the Court of Claims to hear and determine the claims of plaintiff "notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance" in the manner set out in section 2 of the bill.

Section 2 of the bill would direct the Court of Claims to determine and render judgment on certain claims of Pope for "work performed for which he has not been paid, but of which the Government has received the use and benefit." This work is described as certain excavation and concrete work performed pursuant to change orders and the excavation of caved-in places and the filling of such caved-in places with dry packing and grout. When the claim in respect of these items was originally presented to the Court of Claims, the court said: "The changes involved were clearly changes which under contractual procedure would have been ordered and paid for accordingly; they were alterations clearly contemplated by the contract and not of a character either in scope or extent as to fall without the contemplation of the parties in making the contract." The court also found that as a result of the above-mentioned change orders, the plaintiff incurred an additional expense of \$10,427. Recovery was denied, however, on the ground that the change orders were not in writing as required by the contract.

This section in effect would waive the contract requirements that change orders be in writing and would permit the claimant to recover at contract rates the value of the work performed as a result of the above-mentioned change orders.

Whether or not the bill should be enacted is a question of legislative policy as to which I prefer not to make any suggestions.

Sincerely yours, Robert H. Jackson, Attorney General.

STATEMENT OF ALLEN POPE

I. Necessity of Legislation

The enactment of the pending bill is urged and is necessary because of the fact that the claimant cannot have his

case heard or readjudicated in the Court of Claims unless the Congress grants the court jurisdiction to consider the same.

The facts are that the claimant has availed himself of every remedy at law before coming to the Congress. The Comptroller General did not allow full payment to Pope, after the completion of the tunnel, for the services he had performed and for the materials he had supplied. Therefore, he filed suit in the Court of Claims. When that court handed down its decision and failed to render complete judgment on all the claims presented by him, he endeavored, through five motions for new trial, to have the case reopened and readjudicated by the court. But the court considered itself without jurisdiction to hear his case further and dismissed his motions. The inability of the court to reopen the case was stated by the court on December 6, 1937, when overruling his fourth motion for new trial. The Court stated:

“We discussed in 81 C. Cls. 658 our inability to grant the new trial asked for, and we are convinced now, as we were then, that the court is without jurisdiction to grant a new trial. The issue of jurisdiction is the vital one now before the court. * * *

“*The remedy available to plaintiff, in our view of the present status of the record, resides exclusively in Congress, and in Congress alone. The court is without jurisdiction to grant plaintiff's motion, and it is overruled.*” [Italics added.]

The claimant is not asking the Congress to grant him relief by paying him the amount he claimed before the court. All he is asking is that the Congress, which alone has jurisdiction, direct the court to consider the case again and grant him relief as was denied him heretofore, and give him judgment whereby he can, in a measure at least, be reimbursed expenditures to which he was put in building the tunnel, as to the facts of which there is no doubt, since they are of evidence in the record, and for which the Government has received the benefit, but for the greater part of which claimant has never been paid.

Hence, it is pursuant to the very suggestions made by the court itself, both in its printed decision of December 6, 1937,

and in its advices from the bench when the claimant appeared there with his last motion for new trial, that claimant now seeks relief through an act of the Congress which will confer upon the court jurisdiction to readjudicate his case.

II. The Contract

The pending claim arises out of performance under a contract which was made on December 3, 1924, by the United States, acting through officers of the Army Engineer Corps, with Allen Pope, a citizen of the United States, for the construction of a tunnel for the extension of the water-supply system of the District of Columbia. The contract was a unit-price contract, as distinguished from a lump-sum contract. The work to be done was divided into 10 different items. Payments were to be made on the basis of the unit prices bid for the various items and for as many units of work as were required to complete the project, irrespective of the quantities estimated in the specifications.

III. The Contract Project

The tunnel required to be constructed was a subterranean excavation, approximately straight and level, about 10 feet in diameter and 3,543 feet long. Its depth below the surface varied from 40 to 90 feet, according to the contour of the ground. The excavation was to be supported or braced with timbers where necessary and was to be lined throughout with concrete so that, when completed, the finished inside surface—6 feet in diameter—was smooth concrete.

The Government prepared the contract plans and indicated thereon certain representations as to the character of underground geological formations disclosed by the test borings made by the Government. The specifications warranted the descriptions given. The specifications also provided that when, during excavations, the ground caved in over the crown of the tunnel arch, such caved-in spaces were to be refilled with stones packed in place, called dry packing, and that the voids or spaces between such stones should be thoroughly filled with liquid cement mortar pumped into place. This cement mortar was to be made of specified

proportions of sand, cement, and water, and was termed "grout."

As stated, the work to be done in excavating and constructing the tunnel was divided into 10 items. The 5 principal items, which subsequently became involved in the issues of Pope's case in the Court of Claims, were (1) excavation, (2) timber, (3) concrete, (4) dry packing, and (5) grout. (The designating numbers are those appearing in the contract.)

The Government's estimate of quantities, upon which the contract was predicated and bids compared for award, was based upon the geological representations given on the contract drawing, which showed that the ground throughout the tunnel length would be substantially solid rock. However, the contract provided that as many units of work be supplied and payments made therefor as the exigencies of actual ground conditions imposed. To this end, payments were to be made on the basis of unit prices rather than, or as distinguished from, a lump sum for the whole work. The Government, in addition to warranting its descriptions of geological formations disclosed by its test borings drilled on the site of the proposed tunnel, obligated itself to give all lines and grades for the performance of the work, to measure and make a record of all completed work, and to pay therefor on the basis of the contract unit prices. It was agreed that the work should be completed within 2 years, or by December 4, 1926.

IV. Conditions in Performance Giving Rise to Claims

During performance of the excavation, the character of the geological formation actually encountered by the contractor proved to be much different from that described on the Government's plans. Instead of solid rock, as thereon depicted, standing in place when tunneled into, the ground was wet, running earth, or soft, seamy, loose, unstable formation which caved in. The roof of the excavation caved in for the full length of the tunnel, 3,543 feet. This is in striking contrast to the contract drawing prepared by the Government, which shows the entire tunnel lying in a

region of rock with more than 95 percent of it designated on the drawing as "hard rock".

As a consequence of such conditions which could not have been anticipated from the contract drawings, it was necessary for the contractor to perform far more units of work than the Government had anticipated. For example, large portions of the excavation had to be timbered, and this meant that the cross section had to be enlarged to accommodate the timbers. Thus, more excavation resulted than had been expected. Next, the caved-in spaces had to be refilled with dry packing and grout, which meant the use of more rocks and more concrete than had been anticipated. In fact, the amounts of timber, dry packing, and grout employed by the contractor, as directed, amounted to more than 10 times the Government's contract estimate. (Court findings III, VI, VII, R. 663-70.)

Obviously, therefore, the items of expense which the contractor did incur had not been anticipated to such an extent by the Government or by the contractor; these items were the cost of removing all caved-in materials from the tunnel, the cost of bracing and supporting the excavation with timber, and the cost of refilling the caved-in spaces with the specified dry packing and grout, together with the expense caused by prolongations or by changes of methods of operations imposed by errors, and reversal of decisions by the contracting officers.

That, in a single sentence, is the substance of claimant's case. Insofar as the Government failed to pay for contract work which was necessary, which it directed to be done, and the benefit of which the Government has received, and insofar as its errors and interferences caused damage or otherwise unnecessary expense to the contractor, he now asks redress through such relief as the court may grant him.

V. Court Exhibits Establishing Claim Resulting from Changes in Contract Plans

Claimant respectfully requests the Claims Committee to consider certain exhibits filed by him in the Court of Claims,

and which exhibits he offers in support of his request for the enactment of the pending bill. Claimant believes that the following are established by these exhibits: (a) The court erred in its decision that the changes in the contract work, which were ordered by the contracting officer and which resulted in increasing the cost of the work to the contractor, were not in writing. The fact is that such changes were ordered in writing, as shown by reference to the contract drawings and specifications and letter of the contracting officer hereinafter quoted. (b) The court erred in its decision that the provisions of the contract and specifications were not complied with as to procedure in making changes. The fact is that the contracting officer was within his authority in making the changes he did and in ordering them as he did. They were minor modifications in the contract work which he had authority individually to make. (c) The court correctly determined that claimant was put to additional items of expense by reason of these changes and that the cost of the work was thereby increased. Yet claimant has not been paid for such work, nor for certain materials he supplied at the order of the contracting officer, and of which the Government has received the use and benefit.

The exhibits referred to are as follows:

1. *Plaintiff's exhibit A—Contract.*—The contract provisions as to "Material changes in the contract" are set forth in article 7 of the contract, as follows:

"ART. 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. * * *"

2. *Plaintiff's exhibit A—Specifications.*—The specifications, which formed a part of the contract, provide for "Minor modifications" in paragraph 30 thereof, as follows:

"30. *Minor modifications.*—The contracting officer reserves the right to make any additions to, omissions from, or alterations in the work as described in these specifications and shown on the drawings referred to in paragraph 29, whenever he shall deem such additions, omissions, or alterations necessary or desirable, provided that the sum total of all such additions to or subtractions from the contract plans amount to less than 10 percent of the total amount of the contract price."

3. *Contract provisions as to drawings.*—Paragraph 29 of the specifications (also exhibit A) requires that the contract work should conform to drawings furnished by the Government. The contracting officer also was authorized to furnish such detail drawings as he considered necessary to amplify and explain the contract drawings. Further, he was authorized to correct any errors or omissions in the drawings or specifications, "and his decision in such cases shall be final and binding."

4. *Original contract drawing No. 2.*—This drawing (plaintiff's exhibit No. 1, pt. 2, sheet 2) is entitled "Typical Sections and End Structures." It includes a sketch of a tunnel section on which is depicted the upper B or pay line. The contractor was paid for work up to, but not beyond, the limits of this B line. The same sketch of the tunnel section in this drawing also shows the timber lagging used on the side walls of the tunnel. Lagging consisted of heavy planks placed longitudinally against the walls, a kind of wooden fence, to prevent the side walls of the excavation from caving in.

5. *Revised contract drawing No. 2.*—This drawing (plaintiff's exhibit No. 1, pt. 3, sheet 2) is a blueprint of the tunnel project. It is identical to the original contract drawing, except as to three revisions or changes which are not only marked thereon in writing but also are shown by changes made in the sketch of the tunnel section itself.

"Revision No. 1" appears in writing on this revised drawing as "Revision No. 1. Timbering of tunnel at top of arch lowered 3 inches." Then, on the sketch of the tunnel section itself is shown the timber lowered at the top of the tunnel, resulting in lowering the B or pay line 3 inches below where it appeared on the original contract drawing.

"Revision No. 3" appears in writing on this same revised drawing as "Revision No. 3. Three-inch lagging on side of timbered section removed." Then, on the sketch of the tunnel section is shown concrete to be used on the side wall of the tunnel, in place of timber lagging shown and required by the original contract drawing.

6. Letter of contracting officer—Plaintiff's exhibit 28.—

WAR DEPARTMENT,
UNITED STATES ENGINEER OFFICE,
July 23, 1925.

Mr. ALLEN POPE,
Washington, D. C.

DEAR SIR: Herewith find four prints of our drawing No. 2 revised July 21, 1925. This revision is made in accordance with the provisions of paragraph 29 of the specifications and shows the removal of the lagging on the side of the timbered section of the tunnel.

Very truly yours,

J. A. O'CONNOR,
*Major, Corps of Engineers,
District Engineer.*

7. Summation of exhibits.—There seems no question but that the change, whereby Pope was put to the expenses he claimed and for which he has never been reimbursed, did conform to the requirements of the contract and specifications. The changes referred to were not material changes which, under article 7 of the contract, had to be agreed upon in writing and, in addition, had to be approved by the Secretary of War. These changes were minor modifications, contemplated and covered by paragraph 30 of the specifications

which formed a part of the contract, and which reserved to the contracting officer authority individually to make such changes in writing when the said changes amounted to less than 10 percent of the contract price. Much less than 10 percent of the contract price is involved in the changes which were made. Therefore, the modifications or changes ordered by the contracting officer were clearly within the authority given him by the contract. The revised contract drawing on which these changes were noted in writing, and also sketched thereon, and the letter of the contracting officer to Pope, forwarding the revised contract drawing, obviously conformed to the requirement that "changes will be ordered by the contracting officer in writing." The court, manifestly through error, denied Pope payment for those items of work resulting from these changes.

VI. Other Items of Work for Which Claimant Has Not Been Paid

The court further found that the cost of excavating the tunnel was materially increased to the contractor, because he encountered much material that was soft, seamy rock, and running earth, "materials contrary in formation from what he expected to encounter" (Finding XIV, R. 673, Decision, p. 11). As the result of this condition, he was required to excavate materials which caved in over the tunnel arch, and then to fill the caved-in spaces with dry packing (stones put into place) and grout (liquid cement mortar which was pumped into the spaces between the dry packing, thus consolidating the whole into a solid mass). This was done at the direction of the contracting officer. See, for example, the findings of the court showing contract drawing entitled "Construction in untimbered sections" (pl. II, R. 665, Decision, p. 3) and the statement of the court in explanation thereof:

"The roof, rotten seamy rock, caved in for entire length of 2,000 feet. The concrete arch lining was built to the B line. The space over the arch outside of the B line was required to be filled with dry packing, and, by direction of the Chief of Engineers on plaintiff's appeal, was required to be

grouted full. No payment has been made for any of the dry packing nor grout thus required to be used."

Also, see court findings and contract drawing entitled "Construction in timbered sections" (pl. III, R. 666, Decision, p. 4) and the statement of the court in explanation thereof, as follows:

"All spaces over the arch, including cave-ins outside of the B line vertically extended as at 'X', and 'above elevation 325' as at 'Y', were required to be dry packed * * *.

"The second officer permitted grouting only to the 6-inch level but later, by direction of the Chief of Engineers on plaintiff's appeal, he required the entire space to be grouted. Payments made only in part and not based on measurements."

There is no questioning the fact that Pope did supply dry packing and grout for which he has not been paid. The court, in its decision on this point, stated:

"The next item in suit is for dry packing the spaces over the crown of the tunnel arch. The plaintiff, as we have previously observed, claims he dry-packed a total area of 5,561 cubic yards ascertained, as pointed out hereinbefore, by the liquid method. We have said that the plaintiff might recover for the total area dry-packed and grouted. The obstacle in the way is the lack of proof defining the extent of space dry-packed." (R. 679, Decision p. 17.)

The pending bill would enable the court to determine the amount of dry-packing by the so-called liquid method, "as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing." From such evidence as has heretofore been presented to the court, and from such additional evidence as may be required, it would seem that the court can reasonably determine what dry packing and grout were supplied by the contractor for which he has never been paid.

VII. Conclusion

Reference of this matter again to the Court of Claims is, therefore, only just and equitable in order to obviate a hardship which has been imposed upon the contractor. Only in this way can the Congress enable the court to rectify its own mistake and compensate the contractor for the materials and labor which he furnished to the Government, which were necessary in the construction of the tunnel, which the contracting officer directed to be supplied, of which the Government has received the benefit and use there many years, and yet for which Pope has not been paid.

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